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Constitutional Law - Police Power - Ordinance Making House to House Canvassing a Nuisance

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CONSTITUTIONAL LAW—POLICE POWER—ORDINANCE MAKING HOUSE TO HOUSE CANVASSING A NUISANCE—A municipal ordinance[1] declared the practice of going in and upon private residences without an invitation, by solicitors, peddlers, hawkers or itinerant merchants and transients, and vendors of merchandise to be a nuisance and punishable as a misdemeanor. Section 4 of the ordinance contained the following exception: "Provisions of this ordinance shall not apply to the vending or sale of ice, or soliciting orders for the sale of ice and milk, and dairy products, truck vegetables, poultry and eggs and other farm and garden produce so far as the sale of the named commodities is now authorized by law." Defendant was convicted of having violated the ordinance. *Held,* that the ordinance was a proper exercise of police power, in that it tended to prevent fraud, deceit, cheating and imposition, and the consequences thereof. *City of Shreveport v. Cunningham,* 190 La. 481, 182 So. 649 (1938).

The instant case is in accord with the majority rule as enunciated in *Town of Green River v. Fuller Brush Company.*[2] It must be borne in mind that such an ordinance does not denounce peddling, but is aimed at the annoyance caused to householders by uninvited solicitors and peddlers.[3] It is directed not at the sale of goods, but at the manner of their sale.[4] Since the evil contemplated by the ordinance is the annoyance caused by peddling and not the act of peddling, such an ordinance applies to solicitors of wares for future delivery.[5]

Presumably the solicitation of out of state orders is within the purview of the Louisiana ordinance. This is not unconstitutional as a regulation of interstate commerce but has a mere incidental effect on such commerce. It is primarily a matter for local

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as a result of the jealousy which the judiciary entertained toward legislation. It is unfortunate that such a doctrine has crept into Louisiana for the reason that in civil law states all *rights* emanate from the legislature.

1. Ordinance No. 50 of 1937 of the City of Shreveport.

2. 65 F. (2d) 112, 88 A.L.R. 177 (C.C.A. 10th, 1933) noted (1934) 18 Minn. L. Rev. 475.

3. Ibid. Town of Green River v. Bunger, 50 Wyo. 52, 58 P. (2d) 456, 458 (1936). The Wyoming Court said: "The ordinance in question is intended to suppress acts having a tendency to annoy, disturb, and inconvenience people in their homes."

4. Wardens License, 24 Pa. Super. Ct. 75 (1903). See also: New Orleans v. Fargot, 116 La. 369, 40 So. 735 (1906) (peddlers and hawkers prohibited from crying their goods in a loud and boisterous manner in the city streets) and St. Martinville v. Eugas, 158 La. 262, 103 So. 761 (1925) (exposure of meat for sale limited to public market place).

5. Town of Green River v. Fuller Brush Co., 65 F. (2d) 112, 88 A.L.R. 117 (C.C.A. 10th, 1933), noted in (1934) 18 Minn. L. Rev. 475. Town of Green River v. Bunger, 50 Wyo. 52, 58 P. (2d) 456 (1936).

control.[6] An imposition of a heavy license tax on peddling has been held valid[7] but a discriminatory tax placed on the solicitation of out of state goods is an interference with interstate commerce.[8]

Several cities have passed ordinances similar to the one under discussion. In considering such an ordinance recently, the Supreme Court of Florida[9] reached a conclusion contrary to that of the instant case, holding the ordinance to be an unreasonable exercise of the police power in violation of constitutional rights. Other state courts have reached this same result.[10] These decisions seem indistinguishable from the instant case on constitutional grounds. They might have been differentiated in that, in the Louisiana case, there was clear cut statutory authority for the enactment of the ordinance in question,[11] whereas the cases holding to the contrary show a lack of such statutory authority.[12] The decisions, however, do not appear to be grounded on this point.

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6. Town of Green River v. Fuller Brush Co., 65 F. (2d) 112, 88 A.L.R. 117 (C.C.A. 10th, 1933) noted (1934) 18 Minn. L. Rev. 475. Town of Green River v. Bunger, 50 Wyo. 52, 58 P. (2d) 456 (1936) (An ordinance similar to the one in the main case was attacked as being unconstitutional. The Supreme Court of Wyoming held it to be valid. An appeal to the United States Supreme Court was dismissed for want of a substantial federal question. 300 U.S. 638, 57 S.Ct. 510, 81 L.Ed. 854 (1937). Rehearing denied 300 U.S. 688, 57 S.Ct. 752, 81 L.Ed. 889 (1937). In dismissing this case, the Supreme Court cited as authority Williams v. State, 85 Ark. 464, 108 S.W. 838 (1908), aff'd, 217 U.S. 79, 30 S.Ct. 493, 54 L.Ed. 673, 18 Ann. Cas. 865 (1910) (statute prohibiting soliciting on trains).

7. City of Duluth v. Kemp, 46 Minn. 435, 49 N.W. 235 (1891).

8. Welton v. Missouri, 91 U.S. 275, 23 L.Ed. 347 (1876) (Missouri statute requiring a license tax from persons selling out of state produce or merchandise held invalid under the commerce clause); Robbins v. Shelby Taxing District, 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 679 (1887). Brennan v. City of Titusville, 153 U.S. 289, 14 S.Ct. 829, 38 L.Ed. 718 (1894).

9. Prior v. White, 180 So. 347 (Fla. 1938) noted (1938) 23 Minn. L. Rev. 88.

10. City of Orangeburg v. Farmer, 181 S.C. 143, 186 S. E. 783 (1936) (Ordinance of Orangeburg, S.C., held to be unreasonable because based upon the act and not the conduct of the salesman); Jewell Tea Co. v. Town of Bel Air, 172 Md. 536, 192 Atl. 417 (1937).

11. The charter of the City of Shreveport, La., Act 74 of 1934, § 2, declares: "That the City of Shreveport shall have, and is hereby given the following powers, to-wit: . . . (7) . . . to regulate (or suppress) . . . peddlers . . ."

12. Prior v. White, 180 So. 347 (Fla. 1938) noted (1938) 23 Minn. L. Rev. 88; City of Orangeburg v. Farmer, 181 S.C. 143, 186 S.E. 783 (1936); Jewell Tea Co. v. Town of Bel Air, 172 Md. 536, 192 Atl. 417 (1937). An activity may be declared a nuisance only when it is such by common law or by statutory definition, State v. Mott, 61 Md. 297, 48 Am. Rep. 105 (1883). A nuisance in fact may be declared by the municipality, McQuillin, Municipal Ordinances (1904) § 441, p. 687, n.79; S. H. Kress and Co. v. City of Miami, 78 Fla. 101, 82 So. 775 (1919). Express statutory authority is necessary to permit regulation of an activity which is not a nuisance *per se*, Jewell Tea Co. v. Town of Bel Air, 172 Md. 536, 192 Atl. 417 (1937); Yates v. The City of Milwaukee, 77 U.S. 497, 19 L.Ed. 984 (1870).

Although the Louisiana ordinance under discussion is similar to those in the contrary cases, it is of much broader scope. It goes further and "classifies" solicitors and peddlers by excepting those who sell certain types of produce: namely, ice, vegetables, butter, eggs, dairy products, and other farm produce. This classification was held not to be class legislation and therefore not discriminatory. The Court reasoned that wide discretion must be conceded to the legislative power in the classification of trades, callings, businesses or occupations, and that "legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited by the United States or the State Constitution." If, however, the manner of solicitation or sale is the criterion of classification, it is hard to see how the activity of vendors of farm produce can be differentiated from that of vendors of other products not excepted from the application of the ordinance. On the other hand, if the classification emphasizes the possibility of annoyance and deceit, the distinction is perhaps well founded. It may be that the court felt that deceit does not characterize peddling of farm produce and that, in view of the difficulty which city-dwellers have in obtaining fresh country products, house-to-house peddling of this class of goods may well be considered a convenience rather than an annoyance.

R. K.

EMANCIPATION BY MARRIAGE—IS CONSENT OF PARENTS OR TUTOR NECESSARY FOR A MINOR OF EIGHTEEN?—In the succession proceedings of Mrs. Hecker, her surviving husband was appointed tutor of the minor children. In lieu of the legal mortgage a special mortgage in favor of the minors had been placed on two lots of ground and, when the tutor desired to sell one of them, he obtained permission of the court to substitute a United States Bond for the special mortgage on that lot. The recorder of mortgages nevertheless refused to cancel the mortgage on the ground that since the minor (eighteen years of age) had been fully emancipated by marriage the court could not authorize the substitution of a bond. The minor asked for the cancellation of the mortgage but the father and tutor contended that there was no emancipation by a marriage without his consent. *Held,* that under Article 382 of the Louisiana Civil Code of 1870, as amended by Act 224 of